United States District Court
Western District of Michigan
Southern Division

Laurencio Bautista-Cruz,
Plaintiff,

v.

Don Pancho Market, LLC
Luz Cervantes, and
Francisco Cervantes,
Defendants.

Hon. Paul L. Maloney

Case No. 15-cv-698

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DEFENDANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

There are two potential sources of conflict in this case. The first comes from potential claims that the Cervantes may raise against Nyeholt related to liability that they have incurred as a result of filing the abuse of process claim in which he was involved, in *Cruz v. Don Pancho*. The second comes from potential direct conflicts because Nyeholt and his firm are *personally* sued filing the abuse of process counter-complaint in *Cruz v. Nyeholt*. Contrary to Plaintiff's statements to the court, this particular conflict was not created by Nyeholt's actions, but was caused by Plaintiff's counsel's decision to initiate a questionable claim against Nyeholt personally at this stage in the litigation.

With respect to the potential claims the Cervantes have against Nyeholt for the abuse of process claim stated in *Cruz v. Don Pancho*, it is believed that the potential for this claim does not significantly impair Nyeholt's representation. Under Rule 1.7(b), an attorney may continue with a representation if there is a *potential* conflict if he believes the representation will not be impacted and the client consents after consultation. Providing specifics of the correspondence between Nyeholt and the Cervantes about this issue would be viewed as a waiver of attorney/client privilege. However, the Court needs to know that the Cervantes have been counseled, in writing, as to the potential conflict, encouraged to review circumstances with independent counsel prior to proceeding, and given ample time to do so. They have consented to the continued representation, despite this potential conflict. Further, they have expressed no desire to pursue a claim against Nyeholt at this time. Indeed, unless and until a judgment enters against them on the retaliation count, such a claim would be premature. Nyeholt believes, for a reasons to be discussed herein, that the representation in the claim will not be significantly impacted by this possible future claim. The undersigned requests *in camera* review of the specific correspondence related to these contentions.

The main conflict that would prevent continued representation stems from the later filed claim *Cruz v. Nyeholt*. Again, concerns of waiving the attorney client-privilege prevents disclosure of the specific statements between counsel and client. But, the Court should know that the Cervantes have again been counseled as to the circumstance and to the potential conflict it creates and have expressed that they nonetheless desire for Nyeholt to continue with the representation. **Ex. B.** However, because *Cruz v. Nyeholt* puts Nyeholt is in a direct financial conflict of interest with his clients, it is believed that continued representation would likely be adversely affected and, therefore, is likely improper because of this. Because it is believed that *Cruz v. Nyeholt* will be summarily dismissed[1], it is asserted that it would be fundamentally unfair to deny the Cervantes their counsel of choice (and, subject them to the financial hardship of hiring new counsel at this juncture) because of Plaintiff's questionable decision to initiate this claim at this point in time. Therefore, the undersigned has sought a stay of proceedings while it is resolved.

Given the Cervantes' expressed desire to continue with Nyeholt as counsel, and the particular financial hardship that discontinuing representation at this time would invoke on them, the undersigned believes, as discussed more fully herein, that Rule 3.7 allows for the continued representation, despite the risk of Nyeholt having to testify Plaintiff raised in response to the motion to stay. His clients have been counseled to potential conflicts with the representation. They have been *strongly* encouraged to seek independent counsel to evaluate the wisdom in continuing with this representation, and provided resources to do so. However, retaining new counsel will create a *significant* hardship, especially given the timing of the filing of *Cruz v.*

[1] It would be the first claim against an attorney for retaliation under the FLSA, Title VII, or any similar statute, was allowed to proceed based solely on filing a pleading in an action.

Nyeholt. It is suggested that continued representation may be performed without running afoul of the Rules of Professional Conduct if and when *Cruz v. Nyeholt* is dismissed with prejudice.

STANDARD OF REVIEW

Motions to disqualify are intensely fact specific and, as one court noted, it is essential that the court approach such questions with a "keen sense of practicality as well as a precise picture of the underlying facts." *Huntington v. Great Western Resources, Inc.,* 655 F.Supp. 565, 567 (S.D.N.Y.1987). As the Eastern District of Michigan noted fairly recently,

> *[a] motion to disqualify counsel may be a legitimate tool to protect the integrity of judicial proceedings. Because the "ability to deny one's opponent the services of capable counsel is a potent weapon," however, courts must be vigilant in reviewing disqualification motions. The court must balance the interest of the court and the public in upholding the integrity of the legal profession against the right of a party to retain counsel of its choice. The movant bears the burden of proving that opposing counsel should be disqualified. A decision to disqualify counsel must be based on a factual inquiry conducted in a manner allowing appellate review, but an evidentiary hearing is not necessarily required. MJK Family LLC v. Corporate Eagle Mgmt. Servs., Inc.*, 676 F. Supp. 2d 584, 592 (E.D. Mich. 2009) (*citations omitted*).

The Comment to Rule 1.7 of the Michigan Rules of Professional Conduct, with respect to "Conflict Charged by an Opposing Party," likewise provides that "[w]here conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. ***Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.***" *Comment to MRPC Rule 1.7.* In evaluating attorney disqualification, the Sixth Circuit has held that the court should consider:

(a) The interest in the public in the proper safeguarding of the judicial process,
(b) The interest of the defendants, and
(c) The interests of the plaintiff.

General Mill Supply Co. v. SCA Services, Inc., 697 F.2d 704, 711 (1982).

The interests of the litigants that the Court considers include both the potential injury if their chosen counsel is allowed to continue *and* of potential injury if the chosen counsel is disqualified. *Id.*

As the Western District of Michigan has itself observed,

> [a] violation of the rules of professional ethics … does not automatically necessitate disqualification of an attorney. Rather, the extreme sanction of disqualification should only be utilized when there is a reasonable possibility that some specifically identifiable impropriety actually occurred, and where the public interest in requiring professional conduct by an attorney outweighs the competing interest of allowing a party to retain counsel of his choice." *El Camino Res., Ltd. v. Huntington Nat. Bank*, 623 F. Supp. 2d 863, 875-76 (W.D. Mich. 2007) (citations omitted) (Hon. Mag. J. Scoville).

Further, "[t]he court should order disqualification only where some 'specifically identifiable impropriety' has actually occurred[.]" *Id.* at 883. Likewise, as the Eastern District of Michigan has observed,

> ***A client may consent to a conflict if the consent is informed.*** *The amount of disclosure required, however, depends on the circumstances. The Sixth Circuit has recognized that it is not sufficient that both parties be informed of the fact that the lawyer is undertaking to represent both of them, but he must explain to them the nature of the conflict of interest in such detail so that they can understand the reasons why it may be desirable for each to have independent counsel. While the exact requirements for "informed consent" are undefined, "[i]t is doubtful that passing conversations at cocktail parties and in the hallways" satisfies the requirement. MJK Family LLC,* 676 F. Supp. 2d at 597-98 (E.D. Mich. 2009) (emphasis added, internal citations and quotations omitted).

In the instant case, apart from a series of 'what ifs' from the Defendants, there is no specific, identifiable impropriety that the undersigned has engaged in towards his client justifying disqualification. Further, and more importantly, the Cervantes have been correctly counseled as to the risks of continuing with the representation and have repeatedly stated that they desire to continue with the representation in *Cruz v. Don Pancho*, even after the FLSA retaliation claim was allowed to proceed, and even after *Cruz v. Nyeholt* was filed. To the extent possible under the rules, their wishes should be honored.

ARGUMENT

I. Nyeholt may continue to represent the Cervantes without violating Rule 3.7 after *Cruz v. Nyeholt* is dismissed.

Rule 3.7(a) states that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where (1) the testimony relates to an uncontested issue, (2) the testimony relates to the nature and value of legal services rendered in the case, or (3) disqualification of the lawyer would work a substantial hardship on the client." MRPC 3.7(a)(1)-(3). The comment relevant to this particular provides provides, in pertinent part, that

> *[i]t is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem. Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party.* MRPC 3.7 Comment.

As Plaintiff pointed out in response to the Motion to Stay, a central fact to the FLSA retaliation component of both *Cruz v. Don Pancho* and *Cruz v. Nyeholt* is the motive in filing the abuse of process claim. Indeed, as one court noted, *Nix v. WLCY Radio/Rahall Comm's,* 738 F.2d 1181, 1187 (11th Cir.1984) "[a] defendant may take an adverse action for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a [retaliatory] reason." Therefore, the motive in filing the abuse of process is at issue. The concern that Bautista-Cruz' counsel has raised seems to be that there would be a conflict in the testimony between Nyeholt and his clients with respect to the motive in bringing the abuse of process claim. "Specifically" claims Plaintiff's counsel "it will be necessary to examine the decision making process of Defendants and Defense Counsel at the time they determined that the abuse of process claim was a viable non-frivolous claim." (Response, ECF 39, PageID 349.)

First and foremost, whether or not he is disqualified from representation, Nyeholt *cannot* testify about his conversations with his client about the pending litigation because these conversations are protected by the attorney client privilege. Second, because the Court has already sanctioned Nyeholt for the abuse of process claim, there is no "blame" to be argued over for filing it; the Court has already "blamed" Nyeholt and sanctioned his decision. Further, the "terrifying" risk of "inconsistent testimony" that Plaintiffs express concern over does not survive a more thoughtful analysis to follow. Finally, even if Nyeholt has to testify and the other factors are present, the hardship that retaining new counsel at this stage in the litigation outweighs the benefits of disqualifying and so Rule 3.7(a)(3) allows him to stay on.

a. Nyeholt cannot testify about his client's statements to him in deciding to bring the abuse of process claim, nor his counsel to his clients before doing so because such conversations are privileged.

Plaintiff's counsel anticipates that Nyeholt and the Cervantes will have to give testimony about the "decision making process" behind filing the abuse of process claim. MRPC 1.6 prevents Nyeholt from revealing confidences or secrets of his clients. Confidential information disclosed by a client to an attorney to obtain legal assistance is protected by the attorney-client privilege. *Fisher v. U.S.,* 425 U.S. 391 (1976). An attorney's communications to a client may also be protected by the privilege, to the extent that they are based on or contain confidential information provided by the client, or legal advice or opinions of the attorney. *U.S. v. Margolis,* 557 F.2d 209, 211 (9th Cir.1977); *Mead Data Central, Inc. v. U.S. Dept. of *1282 Air Force,* 566 F.2d 242, 254, n. 25 (D.C.Cir.1977). Emails between an attorney and his client are subject to this privilege. *State Farm Mutual Auto Ins. Co. v. Hawkins*, 2010 WL 2813327 (ED MI 2010).

Further, even if the attorney-client privilege is held not to apply to the testimony as to Nyeholt's reasoning and counsel behind the abuse of process claim, the work product privilege surely does. Fed.R.Civ.Pr. 26(b)(3)(A) provides that, absent a showing of "undue hardship" or "substantial need," "[a] party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). Even if the Court orders production of such documents on a showing of "substantial need" and "undue hardship" to the other side the Court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed.R.Civ.Pr. 26(b)(3)(B). Under no circumstances do the Court Rules allow a party to access an attorney's mental impressions, conclusions, opinions, or legal theories concerning a pending litigation. The work-product privilege is given broader interpretation than the attorney-client privilege. *See, eg* 8 Wright, Miller & Marcus, *Federal Practice And Procedure:* Civil 2D § 2024 (1994). Plainly, Nyeholt's mental impressions and reasoning behind the abuse of process claim is subject to this privilege.

Even if Nyeholt and his firm *are* disqualified, the duty of confidentiality survives the termination of the attorney-client relationship. MRPC 1.9. Therefore, Nyeholt *cannot* be called upon to testify as to conversations he had with his clients prior to filing the counterclaim because they are absolutely privileged. Therefore, the risk of inconsistent testimony of which the comment to the rule speaks is significantly limited.

b. Nyeholt's responsibility for filing the abuse of process claim, in light of the Court's finding, is an uncontested issue.

Defendants' primary concern is "inconsistent testimony" as to who was to blame for filing the abuse of process claim. "Defendants and Defense Counsel's testimony will be directly adverse to each other and it is reasonable to assume that each will blame the other for the filing of the frivolous retaliation claim" warns Plaintiff's counsel. The court has already held Nyeholt accountable for doing so and has sanctioned him accordingly. Even if the Court should compel Nyeholt to testify as to his pre-filing conversations with his clients, the question of who was to "blame" for the filing of the abuse of process claim has already been decided by the Court.

c. The "inconsistent testimony" concern Plaintiff's counsel raises is illogical.

Plaintiff's counsel raises the concern that "Defendants and Defense Counsel's testimony will be directly adverse to each other and it is reasonable to assume that each will blame the other for the filing of the frivolous retaliatory counterclaim." (Plaintiff's Brief, ECF 39, PageID 350.) In a different part of the same pleading, they cite the principle that "Defendants are responsible for the actions of their counsel." (*Id.* at PageID 347.) It is not clear, then, how it is they think it would profit the Defendants to "blame" their counsel for filing the counterclaim if they are responsible for his actions anyway. With *Cruz v. Nyeholt* pending Nyeholt, conceivably, would have an incentive to try to "blame" his clients for the abuse of process claim. (Not that he would. It seems a bit absurd for the *lawyer* to assert his *clients* recommended a particular legal cause of action.) However, this hypothetical incentive for Nyeholt to "blame" the plaintiffs is only present if *Cruz v. Nyeholt* is allowed to proceed. If, for the sake of argument, *Cruz v. Nyeholt* is summarily dismissed Defense counsel will have no incentive whatsoever to "blame" his clients for anything because in that circumstance he cannot be held personally liable. Therefore, it is extremely *unlikely* that there will be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm and, therefore, the representation is proper.

d. The hardship to the Cervantes of retaining a new attorney at this time far exceeds the limited risk of Nyeholt being called as a testifying witness.

Even if Nyeholt does have to testify (or even can) the Rules require that we balance the hardship to the clients against concerns raised by the attorney testifying. Rule 3.7(a)(3) allows an attorney who may be called upon to testify to continue to act as counsel, if the hardship of disqualifying them substantially outweighs the difficulties presented by their continued representation. With respect to Rule 3.7(a)(3), the Comment to the Rules provides as follows:

> ***Paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party***. *Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses.* ***Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client.*** Comment to Rule 3.7.

Contrary to the immense amount of judicial resources that Plaintiff's counsel continues to expend on this claim, Don Pancho LLC is not a wealthy organization. They are a small store located in Lansing, MI with a small staff and a small clientele. The Cervantes also are not individually affluent either; they pay themselves less than $8.50 per hour for their work at the store. This is the quintessential "mom and pop" organization that is sued. The cost of hiring a new attorney for them at this stage in the litigation is prohibitive and particularly onerous. It bears noting that this additional cost would be paid from moneys that could otherwise be put towards a settlement, making this already contentious claim even *harder* to resolve.

Plaintiff's decision to file *Cruz v. Nyeholt* at this late date has confounded this concern. Plaintiff's counsel expressed their belief that the counterclaim against Cruz was frivolous as early as August 17, 2015 when they filed the amended complaint against Don Pancho. (ECF 12.) As the Court noted, they claimed the abuse of process claim was frivolous in their motion to dismiss. Presumably, Bautista-Cruz' counsel knew the Cervantes were represented in the counterclaim at this point in time; Nyeholt signed the pleading and filed it through is ECF account. Yet, when Plaintiff filed the Amended Complaint for retaliation based on the abuse of process claim, Cruz' counsel did not amend to state a claim against Nyeholt as well. Even if

Cruz' counsel did not realize he had a claim against Nyeholt based on the "frivolous claim" as of August 17, 2015, he *certainly* knew it on March 18, 2016 which is the day the Court entered sanctions against Nyeholt and found the claim frivolous. Yet, Bautista-Cruz' counsel did not advise Nyeholt of its intent to sue him personally until *May 13, 2016*. (**Ex. A**.) There has been a lot of work done in the three months between the Court's sanctions order and the filing of *Cruz v. Nyeholt*.

The parties prepared for and attended a Rule 16 conference together on April 8, 2016. During the Rule 16 conference, the Plaintiffs requested early mediation which caused the Magistrate to set a mediation deadline of July 30. On April 27, Plaintiff filed a Motion for Partial Summary Judgment and Nyeholt incurred time drafting and filing a response thereto (ECF 27 and 36, respectively). On or about May 10, the parties chose a mediator together, Jon March, and worked to coordinate a mediation date of June 30. The parties exchanged Rule 26(a)(1) disclosures on May 16. Nyeholt prepared and served Defendants' first discovery on Plaintiffs during this time. Then, and only after all of this work, did Plaintiff's counsel file suit against Nyeholt and his firm personally on May 20th. The *same day* that he filed the claim against Nyeholt personally, Cruz' counsel served deposition notices on Nyeholt.

The fact that Plaintiff's counsel waited until *May 13th, 2016* to announce their intent to file this claim against the Cervantes' counsel, despite his knowledge of the underlying facts of the claim since *August 17, 2015*, will have the effect of multiplying the Cervantes' costs of defense, given the work that Nyeholt already has performed. It is unreasonable to think that if Nyeholt is disqualified, Defendants' next counsel would be able to get up to speed in time for the June 30th mediation. New counsel may not even assent to the early mediation that Plaintiff requested, especially in light of counsel's conduct. The parties may have to attend a new status conference and get a new scheduling order if Nyeholt is removed. Further, new counsel will almost certainly want to file his or her own response to Plaintiff's Motion for Summary Judgment that Nyeholt filed. In addition to the already prohibitive cost of hiring new counsel, the costs will be conflated by redundant work necessitated by Plaintiff's delayed timing in filing the suit against Nyeholt.

It bears directly on the discussion of the balancing analysis the Rule requires that, rather than attend the June 30th mediation in good faith and attempt to *end* this dispute, Plaintiff's counsel has taken an action to make resolution impossible and dramatically multiply the costs of the litigation.

Rule 3.7(c) allows an attorney to continue with the representation, even if he is expected to be called as a witness, if the hardship for his clients outweighs the problems of his offering testimony. Application of this balancing analysis suggests that the Court may conclude that Nyeholt's continued representation will conform with Rule 3.7. This is particularly true because of the multiplication of costs that have resulted from Plaintiff's delayed filing of the claim against Nyeholt. Absent the added complications posed by the filing of *Cruz v. Nyeholt*, Nyeholt would be able to continue with the representation without violating Rule 3.7.

II. Nyeholt's Continued Representation in *Cruz v. Don Pancho* Conforms with Rule 1.7(b).

MRPC 1.7 provides, in pertinent part, that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by…the lawyer's own interests, ***unless*** (1) the lawyer reasonably believes the ***representation will not be adversely affected***, and (2) the ***client consents after consultation***." As previously stated, the Cervantes have consented to continued representation after consultation. In fact, they are desirous of it. As shall be demonstrated, Nyeholt believes that, once *Cruz v. Nyeholt* is dismissed with prejudice, the representation will not be adversely affected.

a. Cruz' counsel's concern about a *potential* malpractice claim against Nyeholt by the Cervantes is unfounded and insufficient to require disqualification.

Bautista-Cruz' counsel spends an inordinate amount of time describing why the undersigned should be disqualified based on the potential that his clients would cross claim him because they are subject to the retaliation claim based on the filing of the abuse of process claim. (Response, ECF 39, PageID 351-52.) This attempt at disqualification based on this *potential* later complication fails because, as the Western District has previously noted, "[t]he court should order disqualification only where some '***specifically identifiable impropriety***' has actually occurred[.]" *El Camino Res., Ltd. v. Huntington Nat. Bank*, 623 F. Supp. 2d at 883 (W.D. Mich. 2007). Further, as of today, no such claim is threatened. And, unless and until that claim is *ripe* and *asserted*, Nyeholt's interests are aligned with his clients because he has an incentive, *avoiding* such a claim, to reduce or eliminate liability on the retaliation claim.

As of today, the Cervantes have not indicated any desire to pursue such a claim at this time. It is important to note that they were encouraged to review circumstances with counsel of their choice prior to agreeing to continue with the representation, and provided with resources to do so. Granted, counsel has not asked them, and under not circumstances *will* as them, to waive a potential future claim, and such a claim is still a possibility. However, as it stands, there is no pending –or even threatened- claim.

While a potential suit by the client is a concern, it is not such a concern that it will substantially impact the representation going forward. In any representation, there is always the risk that a client will become dissatisfied with the results of the representation and bring a suit. A losing defendant may decide that an attorney didn't ask the right questions at trial and sue. A dissatisfied Plaintiff may decide that an attorney's decision not to pursue documents in discovery they did not receive prejudiced their case and bring suit. It is a risk of any representation that a disgruntled former client who is unhappy with the results of their case will come back with a claim. This, in a very meaningful way, aligns the attorney's interests with their clients during the representation. Do your best to win, or else face potential suit. Further, Fixel & Nyeholt carries malpractice liability insurance that would cover any such claim by the Cervantes if it were asserted. It is suggested that the security and peace of mind of knowing such claims are covered serves to limit the ill effect on the firm's judgment in representing clients despite potential claims.

Granted, the instant circumstance is somewhat different because there is a particular decision that can be pointed to that may result in such a claim. But, the claim is not yet ripe. The claim the Cervantes would have is for additional damages, if additional damages are awarded based on the retaliation claim. This claim would only be ripe *after* the Cervantes are actually made to pay a judgment based on the retaliation claim. If Nyeholt may liable to the Cervantes for damages they incur based on the FLSA Retaliation claim, that creates a *strong* incentive for him to take action to get the claim dismissed or, at least, the damages reduced. At present, it is suggested that Nyeholt's interests are aligned with his clients' because he has an incentive to reduce or eliminate the damages award for this claim.

As for Rule 1.7(b)'s consultation requirement, the Cervantes have been counseled, encouraged to speak to independent counsel, and have consented to and expressed desire for continued representation. The specifics of the conversation are subject to attorney-client privilege and Nyeholt has an obligation under Rule 1.6 to maintain this confidentiality.

However, as previously stated, Nyeholt will happily produce the correspondence related to same for *in camera* review should the Court so require.

In summary, Rule 1.7(b) allows an attorney to continue with a representation in the face of a potential conflict ***if*** the client consents after consultation ***and*** the attorney believes the representation will not be affected. Nyeholt believes his interests, at present, are aligned with his clients because the potential claim against him for liability from the retaliation claim is a strong incentive to seek to reduce or defeat the claim. The Cervantes have been counseled as to the potential conflict because of the retaliation count in *Cruz v. Don Pancho* and have consented to continued representation. It is requested that, because there is no *present* conflict from a threatened or pending claim, that the court defer on this issue until such time as it becomes an issue, ***if*** it ever does.

b. *Cruz v. Nyeholt* creates a direct financial conflict between Nyeholt and the Cervantes. If, for the sake of argument, the claim is dismissed this conflict will be resolved.

Plaintiff's filing of *Cruz v. Nyeholt* has created a substantial conflict between Nyeholt and his clients. The Cervantes have indicated that they are aware of it and nonetheless desire to continue with the representation. It is recognized, however, that it is difficult to argue that the representation will not be adversely affected by a direct financial conflict based on the representation and, therefore, continued representation would likely be inappropriate.

Under the "one satisfaction rule" a plaintiff is only entitled to one set of damages stemming from one claim. *Lim v. Miller Parking Co.*, 526 B.R. 202, 210 (E.D. Mich. 2015) (numerous citations omitted, internal quotations omitted). Here, Cruz sued Don Pancho LLC and the Cervantes for FLSA retaliation because they filed an abuse of process claim against him. Now, Cruz has also sued the Cervantes' attorney and his firm for recommending the abuse of process claim. Under the one satisfaction rule, whether he brings this as *one* claim, in *one* suit, or *two* claims in *two* suits, the fact remains that settlement from one defendant will reduce Cruz' recovery from the other. Every cent the Cervantes pay in settlement comes off of potential award by Nyeholt. And, vice versa.

This circumstance has been explained to the Cervantes. They have advised that they do not desire a change of counsel, even in light of this. That said, Nyeholt acknowledges that this circumstance implicates Rule 1.7(b)(1). Given the one satisfaction rule, every cent his clients pay in settlement or in judgment offsets his exposure. It would be extremely difficult to argue that, in such a circumstance, the representation is not adversely affected. However, once *Cruz v. Nyeholt* is dismissed with prejudice, the conflicting financial interest will be gone.

III. Rule 1.16 was not Violated by Nyeholt's Decision not to Withdraw.

Rule 1.16(a)(1) provides, in pertinent part, that "a lawyer … shall withdraw from the representation of a client if … the representation will result in a violation of the Rules of Professional Conduct or other law." For the reasons previously stated, Nyeholt's continued representation after *Cruz v. Don Pancho* was allowed to proceed on the counterclaim did not and does not violate Rule 1.7 or 3.7. In considering whether Rule 3.7 was complied with to date by continued representation, it should be recalled that Plaintiff's counsel has not announced his (perhaps ill-conceived) belief that Nyeholt should be called upon to testify as to attorney confidences and work product until his response to the Motion to Stay was filed. With *Cruz v. Nyeholt* pending, Nyeholt likely has a conflict under Rule 1.7 that, despite his client's wishes. However, after *Cruz v. Nyeholt* is dismissed, continued representation will not run afoul of Rules 1.7 or 3.7. Therefore, the stay of proceedings was requested while *Cruz v. Nyeholt* is resolved.

Defendants have been well counseled as to the potential conflict presented by their potential claim against Nyeholt based on the FLSA retaliation claim in *Cruz v. Don Pancho* and nonetheless desire for Nyeholt to continue as their counsel. They were even provided with the State Bar of Michigan referral service's number in order to do so. They have elected to continue with the representation. Rule 3.7 is not violated because the attorney-client privilege likely bars Nyeholt from giving the testimony that the other side is after. And, even if Nyeholt is required to testify, the hardship to the Cervantes of hiring new counsel well outweighs the risks and therefore the balancing analysis in Rule 3.7 allows the representation to continue.

As for the conflict posed by *Cruz v. Nyeholt*, the conflict is monetary in nature. With *Cruz v. Nyeholt* pending, the Cervantes payments in settlement offset Nyeholt's exposure and vice versa. Proceeding with the claim pending could easily be viewed as a violation of Rule 1.16. However, if the claim is stayed, Nyeholt will be unable to take any actions on behalf of the clients in the claim during that period of time including moving to withdraw. Therefore, it is suggested that the only fair solution is to stay *Cruz v. Don Pancho* until *Cruz v. Nyeholt* can be dismissed.

IV. It Would be Inequitable to Deny Defendants' Chosen Counsel Based on Plaintiff's Improper Claim against Nyeholt.

In evaluating whether to disqualify a party's chosen counsel due to a perceived conflict, "[t]he court must balance the interest of the court and the public in upholding the integrity of the legal profession against the right of a party to retain counsel of its choice." *MJK Family LLC v. Corporate Eagle Mgmt. Servs., Inc.*, 676 F. Supp. 2d 584, 592 (E.D. Mich. 2009) (*citations omitted*). Here, the Court has written that it

> believes that the very fact that counsel was admonished through a detailed written opinion for asserting a frivolous claim under Rule 11(c)(3), in context with requiring an affirmative act of a small monetary sanction, will together 'suffice'

> to deter counsel, his law firm, and other members of this bar from asserting a claim without first conducting an honest and 'reasonable inquiry.'" (Opinion, ECF 21, PageID 256.)

Despite this fact, Plaintiff has filed a suit seeking in excess of *$75,000* against Nyeholt and his firm pursuant to the FLSA's anti-retaliation provisions. This is utterly unprecedented because no court *anywhere* has approved of such a claim based *solely* on filing a pleading, particularly when the court has already sanctioned the conduct pursuant to the Rule 11. Counsel cannot possibly, in good faith, expect this claim to proceed. But, the timing of the claim relative to other significant work in the case suggests that it was not brought with intent to delay and multiply the costs of litigation. It is asserted that it would be grossly inequitable for Plaintiff's counsel to be permitted to disqualify Defendants' chosen representative by filing a questionable claim against him.

Indeed, courts have noted allowing a cross claim against a represented party's attorney creates a significant conflict and have dismissed such claims on that basis. In *Realco Services, Inc. v. Holt*, the Eastern District of Pennsylvania denied a motion to join an adversary's attorney as third party defendant because "[j]oinder of counsel…would inject unnecessary and unmanageable complications into the case. Issues of attorney-client and work product privilege would all but stall the discovery process … Furthermore, the attorney-client issues would create serious difficulties at trial." 479 F.Supp. 880 (ED PA 1979). In *Realco,* there was a conspiracy claim by the Defendants to the suit against the Plaintiffs, based on their assertion that the suit against them was brought in bad faith and to interfere with their business interests. The defendants later sought leave to join the attorney for the plaintiffs in this "conspiracy" claim. The court, in addition to considering the "unneccessary and unmanageable complications" that naming a party's counsel would inject into the case, also noted that complete relief could be had from the remaining defendants to the claim based on the the improper filing without adding the attorney. This case is relevant to the instant. Plainly, naming Nyeholt as a defendant will inject unnecessary complications into the case, as discussed. And because, as Plaintiff's counsel notes, Defendants are ultimately responsible for his actions, there is no additional relief to be had by naming him and they can receive complete relief in his absence from the suit.

State courts have applied similar reasoning to cross claims against counsel. In *Commercial Standard Title v. Superior Court,* the California Court of Appeals denied a cross complaint against the plaintiff's attorney because "[i]f suit were to be permitted against the current acting attorney for plaintiff…[it] would effectively allow a defendant to require plaintiff's now-sued attorney … to recuse himself." 155 Cal.Rptr. 393, 400 (Ct. App. 1979). Finally, in *Erlandson v. Pullen*, the Oregon Court of Appeals not only noted the fundamental policy against suits against attorney to reject cross claim for malicious prosecution but, more importantly, allowed the attorney's client to pursue a counterclaim for intentional interference with the contractual relationship between the client and his attorney based on the filing of that claim. 608 P.2d 1169, 1179 (Or. Ct. App. 1980).

Interference with the attorney-client relationship alone militates against allowing *Fixel v. Nyeholt* to proceed. Given that *Cruz v. Nyeholt* is exceedingly unlikely to prevail, or even survive a 12(b)(6) challenge, granting a stay while it is resolved, rather than disqualifying counsel, is the equitable result.

CONCLUSION

For the reasons stated herein, Defendants request that this Court:

1. ORDER that Nyeholt may present the correspondence mentioned herein for *in camera* review and provide the method of submission and timing by which he may do so,

2. REJECT Plaintiff's contention that Nyeholt is precluded from further representation based on solely on the pendency of the retaliation claim in *Cruz v. Don Pancho,* and
3. STAY the matter, pending resolution of Nyeholt's anticipated Motion to Dismiss *Cruz v. Nyeholt*,

Or, if Nyeholt is disqualified from representation,

4. STAY the proceedings for such time as may be reasonable for the Defendants to retain replacement counsel,
5. ADJOURN the Case Management Order (ECF 26), particularly the July 1, 2016 mediation date Plaintiff requested, to allow the Defendants to seek new counsel, and
6. STAY decision on Plaintiff's Motion for Summary Judgment to allow replacement counsel to seek to amend the response thereto if he or she so desires.

Respectfully Submitted,

Dated: 6/13/2016

__/s/ Collin H. Nyeholt_______
Collin H. Nyeholt
Attorney for the Defendants

Certificate of Service

I, the undersigned, do hereby affirm under penalty of perjury that on today's date I served the attached document on all parties of record via the Court's ECF system.

Dated: 6/10/2016

__/s/ Collin H. Nyeholt_______
Collin H. Nyeholt
Attorney for the Defendants